Nos. 04-19-00192-CR & 04-19-00193-CR

JOHNNY JOE AVALOS, *Appellant*	§ § §	IN THE FOURTH DISTRICT
v.	§ §	COURT OF APPEALS
THE STATE OF TEXAS, *Appellee*	§ §	SAN ANTONIO, TEXAS

REQUEST TO FILE ADDITIONAL CITATIONS

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

NOW COMES Joe D. Gonzales, Criminal District Attorney of Bexar County, Texas, and undersigned counsel for the State of Texas, and, pursuant to Local Rule 8.3, files this request to file additional citations with the State's brief.

I.

This case is on appeal from the 437th District Court of Bexar County, Texas. The style is *The State of Texas v. Johnny Joe Avalos*, and the trial-court cause numbers are 2018-CR-7068 and 2016-CR-10374, respectively. Oral arguments were granted by this Court on October 1, 2019, and are scheduled to take place on November 5, 2019. While preparing for argument, undersigned counsel discovered additional cases that may be helpful to the Court in its consideration of appellant's points of error.[1]

[1] In light of these additional cases, the State makes arguments to support its position. If this Court construes this filing as a supplemental brief pursuant to Local Rule 8.4 rather than mere "additional citations with succinct comment" pursuant to Local Rule 8.3, the State requests permission to file this as such a brief. 4th Tex. App. (San Antonio) Loc. R. 8.3, 8.4.

II.

In his reply brief, appellant clarified that his argument is not that intellectually disabled offenders cannot receive life without parole under any circumstances, but rather, the *mandatory* imposition of life without parole constitutes cruel and unusual punishment if the offender is intellectually disabled. (Appellant's Reply Br. at 2.) As outlined in its original response, the thrust of the State's counter-argument is that this case is controlled by *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the Supreme Court ruled that the mandatory imposition of life without parole does not constitute cruel and unusual punishment.

In *Harmelin*, the defendant argued two things: First, his life-without-parole sentence was cruel and unusual because it was "significantly disproportionate" to the crime he committed, and, second, the imposition of life without parole absent an individualized sentencing hearing was cruel and unusual. *Harmelin*, 501 U.S. at 961-62. The defendant's first proposition was rejected by the Court, but its reasoning was fractured. *Compare id*. at 962-94 (opinion of Scalia, J.) *with id*. at 996-1005 (opinion of Kennedy, J.). Rejection of the defendant's second proposition, however, garnered a majority of the Court. *Id*. at 994-96 (Part IV of Justice Scalia's opinion); *id*. at 996 (Kennedy, J., concurring with Part IV).[2] *See*

[2] The Court's heading also stated that Justice Scalia "delivered the opinion of the Court with respect to Part IV[.]" *Harmelin*, 501 U.S. at 961.

also id. at 1006-08 (Justice Kennedy further explaining why mandatory sentences of life without parole are constitutional).

Appellant's challenge to the constitutionality of Texas's mandatory life-without-parole statute comports with the *Harmelin* Court's second holding—namely, he contends that, because he is intellectually disabled, the imposition of life without parole absent an individualized sentencing hearing constitutes cruel and unusual punishment. As discussed below, that is key because, until the Supreme Court itself specifically speaks on this issue as it relates to intellectually disabled offenders, this Court is bound to apply *Harmelin*'s general holding, which constitutes binding precedent, despite any subsequent partial abrogation of or deviations from it.

The Supreme Court has repeatedly instructed lower courts to follow its precedents *even if* those precedents seem to have been implicitly abrogated or overruled by later doctrinal developments. *E.g.*, *Eberhart v. United States*, 546 U.S. 12, 19-20 (2005) (expressing gratitude towards the lower court for adhering to the Court's precedent even though that precedent seemed to have been undermined by later interpretive developments); *Agostini v. Felton*, 521 U.S. 203, 237-38 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. . . . The trial court . . . was . . . correct to recognize that the motion had

to be denied unless and until this Court reinterpreted the binding precedent."); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *id*. at 486 (Stevens, J. dissenting) (noting that the lower court engaged in "an indefensible brand of judicial activism" by refusing to follow controlling precedent that seemed to have been abrogated by later case law); *see also Knick v. Township of Scott*, 139 S. Ct. 2162, 2177-78 (2019) ("[O]nly this Court or a constitutional amendment can alter our holdings.").

That instruction has been acknowledged by the federal Fifth Circuit and Texas Courts. *See, e.g.*, *United States v. Dinh*, 920 F.3d 307, 312 (5th Cir. 2019); *Sheffield Development Co., Inc. v. City of Glenn Heights*, 140 S.W.3d 660, 674 (Tex. 2004); *Sellers v. State*, 13-18-00572-CR, 2019 WL 2042040, at *3 (Tex. App.—Corpus Christi–Edinburg May 9, 2019, no pet.) (mem. op., not designated for publication); *see also Ex parte Williams*, 200 S.W.3d 819, 820-823 (Tex. App.—Beaumont 2006, no pet.) (like the lower court in *Eberhart*, questioning the continued validity of a general holding of the Court of Criminal Appeals, but, despite subsequent developments that seemed to undermine it, applying that holding).

Here, the Supreme Court rule at issue is *Harmelin*'s holding that the mandatory imposition of life without parole does not constitute cruel and unusual punishment. The Supreme Court has only deviated from that holding in cases involving offenders who committed homicides while juveniles. *Miller v. Alabama*, 567 U.S. 460 (2012). It is true that the Supreme Court has also categorically barred life without parole for offenders who committed non-homicide offenses while juveniles. *Graham v. Florida*, 560 U.S. 48 (2010). *Graham*, however, did not involve the mandatory imposition of life without parole because the defendant received a punishment hearing. *Id*. at 55-58 (outlining the hearing Graham received and the possible punishments that could have been imposed). Accordingly, its holding does not constitute a departure from *Harmelin*'s general rule at issue here. Moreover, *Graham*'s holding only applied to non-homicide offenses. *Id*. at 69 (noting that, although offenses like robbery or rape are serious crimes deserving serious punishments, "those crimes differ from homicide crimes in a moral sense"). Thus, it is doubly inapplicable to the instant case, where appellant murdered four women and one child.[3]

[3] Appellant also repeatedly references *Graham* in an attempt to equate life without parole to the death penalty. But if life without parole is a death sentence, then this Court must dismiss this appeal for lack of jurisdiction. Tex. Const. art. V, § 5(b); Tex. Code Crim. Proc. art. 4.03 ("The Courts of Appeals shall have appellate jurisdiction coextensive with the limits of their respective districts in all criminal cases *except those in which the death penalty has been assessed.*" (emphasis added)); *id*. art. 4.04, § 2; *id*. art. 37.071, § 2(h). That is, appellant cannot have it both ways—either he received a death sentence and this Court cannot hear this claim, or he did not and this Court must reject his attempts to equate life without parole with the death penalty.

On the other hand, the Supreme Court has never deviated from or abrogated *Harmelin*'s holding in the context of intellectually disabled offenders. It might do so in the future—maybe even in this case. But until it does, this Court must continue to adhere to *Harmelin*'s general rule even in the face of subsequent doctrinal developments that may seem to undermine it.

If *Harmelin* had never been decided, then this situation would be different. In that instance, there would not be an underlying baseline rule regarding the mandatory imposition of life without parole to which this Court is bound, and from which the Supreme Court could, if it saw fit, deviate from. In that case, lower courts could potentially extend *Miller* and related holdings to new circumstances that the Supreme Court had not yet addressed. But *Harmelin* does exist, and, as a result, only the Supreme Court may depart from it. That is, no lower court may extrapolate what the Supreme Court may do with *Harmelin*'s general rule in the context of intellectually disabled offenders.

An analogy helps illustrate the point. Some neuroscience research has suggested that humans, especially males, may not reach full maturity until around the age of 25. If a non-intellectually-disabled defendant who was 19 years old when his crime was committed argued that *Miller* should be extended to him in light of such science—that is to say, because he lacked the requisite culpability due to his age he was entitled to a discretionary hearing before being subject to life

without parole—this Court would be forced to reject that claim and apply *Harmelin*'s holding. That is so because, despite changes in our understanding of maturity, and notwithstanding the defendant's attempt to analogize young adults to juveniles, this Court would still be bound, in the context of non-juvenile offenders, by *Harmelin*'s general holding. That would be true when reviewing the sentences of a host of different types of defendants who may share characteristics with juveniles, notably those defendants with certain physical or emotional disabilities. Simply, despite the seeming appropriateness of deviating from a holding in a particular case, abrogation of general Supreme Court holdings, including *Harmelin*'s, rests with the Supreme Court, not the lower courts.

Of course, this Court may express its doubts about *Harmelin*'s continued validity in the context of intellectually disabled offenders, and such an analysis is welcomed by the Supreme Court. *See Eberhart*, 546 U.S. at 20 ("By adhering to its understanding of precedent, yet plainly expressing its doubts, [the lower court] facilitated our review."). But, nevertheless, it may not unilaterally digress from the Supreme Court's precedent. Instead, such a "decision would have to come from the Supreme Court." *Dinh*, 920 F.3d at 312.

Accordingly, appellant's points of error must be overruled.

III.

WHEREFORE, PREMISES CONSIDERED, undersigned counsel prays that the Court accept these additional citations and comments, or, alternatively, grant permission to supplement the State's brief with the above authorities and arguments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew N. Warthen, hereby certify that the total number of words in this document is 1,469. I also certify that a true and correct copy of this document was emailed to appellant Johnny Joe Avalos's attorney, Jorge G. Aristotelidis, at jgaristo67@gmail.com, on this the 30th day of October, 2019.

/s/*Andrew N. Warthen*
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